Document:-
A/CN.4/SR.1175

Summary record of the 1175th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1972, vol. I

entered into a number of international commitments on Namibia's behalf during that period. There was also the quadripartite treaty on the status of Berlin concluded by the former victorious Powers, which was binding on that territory. It was quite evident that the Special Rapporteur had had in mind all those situations in which the status of a territory had been settled by third Powers with no sovereign rights over the territory.

48. In a word, there were sufficient dependent territories in existence to warrant devoting a special article of the draft to them.

49. Mr. AGO said that article 18 as proposed by the Special Rapporteur was intended not as a definitive text but rather as a basis for discussion of the desirability of applying to certain special situations the rules already established in the draft, or providing separate rules for them.

50. The cases covered by article 18 were extremely varied. Although former trusteeship or dependent territories could, to a large extent, be assimilated to the newly independent States covered by articles 1 to 15, the same was not true of protected or associated States. He would therefore confine his comments to those two categories. Each case, moreover, had its own special features, and only by a process of generalization could the variegated forms actually found be reduced to categories.

51. The term "protectorate" had sometimes been applied to disguised colonies which had not been subjects of international law. However, according to the traditional idea, a protected State was a subject of international law which had rights and obligations at the international level and might even have treaty-making capacity, subject perhaps to a kind of veto by the protecting Power. When the Special Rapporteur had introduced the first articles of his draft, he had made it clear that this definition of "Succession of States" covered not only transfers of sovereignty, but also simple transfers of treaty-making capacity.[7] And it should be noted that the protecting Power, when representing the protected State in international relations and concluding international treaties on its behalf, often took the protected State's interests and wants into account.

52. Whatever the form of protection, he doubted whether the "clean slate" principle could be applied. Such situations did not, in fact, give rise to a true succession of States; it was more a question of the continuation of the existence of a State which had previously been placed under the protection of another State and had now recovered its full autonomy of decision in the matter of international relations. There were indeed cases, as mentioned in paragraph 2 (*a*), where the State had had a separate existence prior to the protectorate and had concluded treaties; such treaties might then remain in force both during and after the protectorate.

53. Nor did he think the "clean slate" principle could be applied to treaties concluded by the protector State on behalf of the protected State, especially if it had in some way obtained the latter's consent. Each situation should be considered separately, bearing in mind the rules proposed by the Special Rapporteur.

54. With regard to associated States, it would also be inadvisable to apply a rigid rule like the "clean slate" principle on the termination of an association which, far from being tainted by colonialism, had sometimes been entered into by mutual agreement. It would be quite unrealistic to assimilate all forms of association to colonial domination.

55. If the Commission felt that it did not have sufficient time to consider in detail all the situations which might arise, it should leave them aside. Personally he thought it would be better to review them all, provided appropriate rules were drawn up for each.

The meeting rose at 1 p.m.

[7] See 1155th meeting, para. 53.

1175th MEETING

Thursday, 8 June 1972, at 10.20 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Co-operation with other bodies

[Item 8 of the agenda]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Molina Orantes, Observer for the Inter-American Juridical Committee, to address the Commission.

2. Mr. MOLINA ORANTES (Observer for the Inter-American Juridical Committee) said that during the past year the Committee had held two regular sessions, at which it had commenced the study of a number of topics.

3. First, it had discussed the revision of various treaties of world-wide and regional scope, with a view to bringing them up to date. In order to facilitate that process at the regional level, the Organization of American States had entrusted the Committee with the preparatory work of analysing and evaluating a number of multilateral treaties in force between member States, in order to decide whether they were in need of revision. In the first part of that task, the Committee had studied various agreements of world-wide scope referred to in General Assembly resolution 2021 (XX), and had expressed its opinion about the approach which should be taken to each of them by the American States.

4. Next, it had made a critical analysis of various inter-American treaties signed during the present century and primarily either of juridical interest or concerning educational, scientific and cultural affairs. They had been evaluated in order to determine, first, whether they were up to date with present American juridical thinking; secondly, whether there had been any far-reaching change in the circumstances which had originally led to their conclusion; and, lastly, whether they had been ratified by a sufficient number of countries.

5. As a result of the Committee's evaluation, various measures had been proposed with respect to each of the conventions in question. In the case of some of them, it had been suggested that a greater number of accessions should be encouraged in order to extend the scope of their application, whereas in that of others, due to the very small number of ratifications, it had been concluded that in practice they were not accepted by the OAS countries.

6. In some cases, it had been recommended that conventions which had become obsolete in their secondary aspects, but not in their fundamental purpose, should be brought up to date. In other cases, it had been thought that a regional agreement had been superseded by another of world-wide scope and that it would be more advisable to accede to the latter because of its greater precision and comprehensiveness.

7. The Committee had taken that view, for example, concerning the Convention on Treaties signed at Havana in 1928,[1] which so far had been ratified by only eight American States. The Committee had felt that the Vienna Convention on the Law of Treaties of 1969, which had been signed by sixteen American governments, was to be preferred because of its universal significance, and that the American States should therefore abandon the Havana Convention in its favour.

8. Secondly, the Committee had devoted a lot of time to the topic of conflicts of treaties, particularly with reference to the constituent instruments of international organizations, both regional and sub-regional. The Committee had considered all aspects of that topic, and had compared the rules contained in various documents which were either the result of juridical research or which embodied some positive law. It had finally concluded that the provisions on conflicts of treaties contained in the Vienna Convention were not only adequate and correct but also applicable in cases where the constituent instruments of regional organizations were amended, unless they presented problems of a political nature, in which case the OAS should lay down the relevant rules for their amendment.

9. Thirdly, the Committee had examined the question of legal means for the protection and preservation of the historic and artistic heritage of the American countries. That topic was of particular interest for those countries because of the acts of vandalism and spoliation continually being committed against the property which constituted their cultural heritage. The Committee had reviewed the conventions in force on a world-wide, regional and bilateral level, as well as the domestic laws of various States, and had reached the conclusion that it was necessary to bring up to date the inter-American conventions dealing with the protection of that heritage, particularly in order to establish an effective system of international co-operation which might help to prevent the growing illicit traffic in archaeological, historical and artistic objects.

10. Fourthly, the General Assembly of the OAS had asked the Committee to study those treaties and conventions which constituted the inter-American system of peace and security, on the basis of the experience gained in their application and with a view to strengthening the system.

11. From the time of their birth as independent States, the American Republics had endeavoured to solve their international disputes or conflicts by peaceful means; a similar concern had been evident when the inter-American system had been inaugurated, by convening periodic conferences of the States of each region. Thus, for example, as early as 1902 a treaty of compulsory arbitration had been signed at the second Pan-American Conference, while in the following years, nine more treaties had been signed providing for the peaceful settlement of disputes by procedures of investigation, conciliation, good offices and mediation, and progressive arbitration.

12. At the ninth American International Conference, held at Bogotá in 1948, the American Treaty on Pacific Settlement, generally known as the "Pact of Bogotá",[2] had been signed on the basis of a draft prepared by the Inter-American Juridical Committee. That Pact combined in a single instrument all the pacific procedures for solving disputes laid down in the specific conventions he had just mentioned and which had since been regulated in a more complete and harmonious manner.

13. In addition to the methods of settlement already prescribed, the States signatories had accepted the obligation to resort to the International Court of Justice for the solution of disputes of a juridical character and, in certain cases, to arbitration. Up to now, the Pact of Bogotá had been ratified by almost two-thirds of the States members of the OAS.

14. After considering the possible alternatives, the Committee had reached the conclusion that the Pact of Bogotá was a suitable juridical instrument for the purpose of consolidating and perfecting the inter-American system of peace and security and that it was more practical to recommend its ratification by States which had not yet done so than to embark on the long road leading to the conclusion of a new treaty.

15. Some members of the Committee had expressed reservations with regard to Article 20 of the Charter of the Organization of American States,[3] which had been signed at the same time as the Pact of Bogotá. In their opinion, it might be interpreted as restricting the

[1] Supplement to the *American Journal of International Law* vol. 29, No. 4, 1935.

[2] United Nations, *Treaty Series*, vol. 30, p. 84.

[3] *Ibid.*, vol. 119, p. 58.

right of an American State to resort directly to the organs of the United Nations for the solution of disputes, without first applying to the organs of the regional system.

16. Fifthly, the greater part of the Committee's last two meetings had been devoted to an examination of the law of the sea, a topic which had been introduced in 1970 and was still on its agenda. The main purpose of the study had been to combine in one document the common principles upheld by the majority of American States with regard to the most important aspects of international maritime law, with a view to contributing to the codification work on that topic which was being prepared on a world-wide scale by the United Nations. The Committee had considered all the questions connected with the law of the sea now being discussed in world and regional forums and had felt that, because of their close interconnexions, they should be considered together and not separately, including such questions as the juridical status of the sea-bed and ocean floor and the continental shelf.

17. An analysis of the legislation of the American States, as well as of various regional declarations and agreements, had revealed new trends in the law of the sea, especially with regard to the delimitation of zones of exclusive jurisdiction. The claim for exclusive jurisdiction was based mainly on the need to exploit the natural resources of the adjacent waters, which were considered to be of vital importance to the coastal populations. Regional principles of that kind had found their expression in the declarations of Montevideo [4] and Lima [5] of 1970, which had proclaimed the right of coastal States to establish zones in which they would exercise their sovereignty or maritime jurisdiction without affecting the freedom of international communications.

18. Sixthly, as one of a number of topics concerning credit documents, and as a contribution to the process of regional economic integration, the Committee had approved a draft convention on the Latin American traveller's cheque, which had recently been submitted for the consideration of States members of the OAS.

19. Seventhly, at the request of the OAS Council, the Committee had made a study of the juridical status of so-called "foreign guerrillas" in the territory of States members, but had not reached any agreement on the drafts presented. A discussion had also been opened on the topic of the treatment of foreign investments, which it had been agreed to continue at the coming meetings.

20. The next regular session of the Committee would be held at Rio de Janeiro from 17 July to 26 August 1972; on behalf of the Committee he took pleasure in extending an invitation to the Commission to send an observer to represent it at that session.

21. The CHAIRMAN thanked the observer for the Inter-American Juridical Committee for his very interesting statement.

22. Mr. TSURUOKA said that he was very sorry not to have been able to attend, in his capacity as Chairman of the Commission at its twenty-third session, the previous session of the Inter-American Juridical Committee; Mr. Sette Câmara had been requested to replace him.

23. Mr. Molina Orantes had given a most lucid account of its activities in various spheres. The choice of topics considered the previous year bore witness once again to the value of close co-operation between the Committee and the Commission. Although some of the topics dealt with by the Committee were primarily of a regional nature, others were of interest to the international community as a whole.

24. Mr. SETTE CÂMARA said that he wished to thank Mr. Molina Orantes for his substantial report, which gave a clear idea of the work done during the past year by the Inter-American Juridical Committee. Mr. Molina Orantes was himself one of the outstanding personalities on that Committee, since he had served as Minister for Foreign Affairs of Guatemala, was the Dean of the Law Faculty of the University of Guatemala and was well known as a writer on international law.

25. The Latin American legal system was one of the oldest in the world and the Committee itself, which had been established fifty years ago, was rich in tradition. It now found itself faced with the task of bringing old conventions up to date, including not only those which had been prepared by the Committee itself but also general treaties of world interest. The work being done by the Committee in that field was of great practical significance and would benefit the world community as a whole.

26. Of particular interest was its work in bringing up to date the inter-American conventions for the protection of cultural and artistic treasures, as well as its efforts to strengthen the inter-American system of peace and security and to obtain additional ratifications of the Pact of Bogotá.

27. The Committee's work on the law of the sea was also very important, in view of the fact that a world conference on that subject was expected to be held in 1974. If the Latin American countries succeeded in reaching a consensus on that question, it would have a great impact on the conference.

28. The draft convention on the Latin American traveller's cheque prepared by the Committee, although not such a glamorous topic as the others, was nevertheless of real practical utility.

29. The Latin American countries, while proud of their own legal institutions, fully realized that international law today was tending more towards universalization and towards a world corpus of legal norms. The interchange of observers between the Committee and the Commission ought therefore to be encouraged in every way.

30. Lastly, he noted with satisfaction that, although the members of the Committee, like the members of the Commission, served in their personal capacity, they were accorded the diplomatic status of ambassadors by the host State.

31. Mr. TABIBI said that he wished to associate himself with the welcome to Mr. Molina Orantes. It was an excellent practice to exchange observers between the Commission and such regional organizations as the

[4] For an English translation, see *International Legal Materials*, vol. IX, p. 1081.

[5] UNCTAD document TD/143.

Inter-American Juridical Committee and the Asian-African Legal Consultative Committee. The Commission, as a universal body, composed of representatives of the main legal systems of the world, always found it most useful to obtain the views of the regional organizations. As an Asian, he was pleased to note the increasing participation of Latin American jurists in the meetings of the Asian-African Legal Consultative Committee.

32. Mr. ALCÍVAR, speaking also on behalf of Mr. Castañeda, said that he was glad to welcome Mr. Molina Orantes, who was not only a brilliant diplomat but also a distinguished professor at one of the oldest establishments of higher learning in the American continent, the University of San Carlos in Guatemala City.

33. Mr. Molina Orantes had presented a very full report on the work done during the past year by the Inter-American Juridical Committee. Although everything Mr. Molina Orantes had said deserved special attention, he would himself confine his remarks to two important points.

34. The first point related to the pacific settlement of international disputes, where the inter-American system was considerably weaker than the United Nations system although, under Chapter VIII of the Charter, the obligation in that respect was the only justification for regional arrangements or agencies as factors in co-operation for the maintenance of international peace and security. Article 52 of the Charter went beyond the modest scope of the Dumbarton Oaks draft and gave to regional arrangements and agencies the character of a sort of preliminary court in the effort to achieve a pacific settlement of any dispute that might arise among its members, before referring it to the Security Council of the United Nations. That provision was reproduced in article 20 of the Charter of the OAS (now article 23). Efforts at the regional level were not meant to continue indefinitely, however, and any party to the dispute might abandon them whenever it deemed it appropriate to have recourse to the competent organ of the world organization. Furthermore, paragraph 4 of Article 52 of the United Nations Charter stated that the provision in that Article "in no way impairs the application of Articles 34 and 35", which meant that, in the cases covered by those Articles, regional courts were ruled out.

35. In his view, the Inter-American system had done nothing to perform the sole function which it could fulfil without the prior authority of the Security Council of the United Nations. The addition made to article 23 (now 26) of the Charter of the OAS related to the establishment, by a special treaty, of adequate means for the settlement of disputes. That treaty, known as the "Pact of Bogotá", began by violating the provisions of Article 103 of the Charter of the United Nations when it stated in its article II "the obligation to settle international controversies by regional pacific procedures", adding almost ironically, "before referring them to the Security Council of the United Nations".[6] Moreover, it was a betrayal of Latin American legal thinking in that the legal doctrine which had been formulated in that part of the American continent in order to get rid of the old concepts of traditional international law imposed by power politics was destroyed by article VI of the Pact, which set out to uphold not validly concluded treaties but "agreements or treaties in force", even if they had been imposed by force, thereby endorsing the tainted doctrine that the *pacta sunt servanda* rule was sacred.

36. He regretted, therefore, that the Committee, instead of proposing a revision of the Pact of Bogotá, had contented itself with recommending that those States which had not yet ratified it should do so. It should be borne in mind that many States had already ratified the Pact subject to so many reservations that it meant little to them.

37. The other point to which he wished to refer was that the Inter-American Juridical Committee was dealing with the problems of ocean space. The General Assembly of the United Nations had decided, at its twenty-fifth session, to convene an international conference on that subject.[7] It was to be hoped that, on that occasion, the Latin American countries would adopt a common attitude towards the formulation of the new principles of the law of the sea which, by doing away with the out-of-date privileges imposed by power politics, would protect the interests of the developing world.

38. Mr. NAGENDRA SINGH said that, on behalf of the Asian-African Legal Consultative Committee, he would like to extend a warm welcome to Mr. Molina Orantes. The Commission was always keenly interested in the progress of regional organizations active in the field of international law and he had been impressed by the long list of topics which the Committee had on its agenda.

39. In view of the obvious need for close co-operation between the Commission and the Committee, he felt it was imperative that the Chairman should attend the next session of the Committee in July and August of the present year.

40. Mr. RAMANGASOAVINA said that the statement by the observer for the Inter-American Juridical Committee brought out clearly the value of co-operation between the Commission and other bodies. Among the importants subjects considered by the Committee, its study of the advisability of bringing up to date and supplementing regional conventions or alternatively, recommending accession to international conventions instead, was of great interest. The Committee's efforts to strengthen the peace-keeping system were also noteworthy, as was its work on the protection of the cultural and historical heritage, a particularly important matter for young countries.

41. American jurists had often been the first to take up topics of major concern to the international community and on several occasions the Commission's work had been facilitated by such earlier studies.

42. Mr. USHAKOV, speaking also on behalf of Mr. Ustor, said that the observer for the Inter-American Juridical Committee was to be congratuled on his excellent

[6] United Nations, *Treaty Series*, vol. 30, p. 84.

[7] See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 28*, p. 26, resolution 2750 C, para. 2.

statement. The Committee had been the first intergovernmental organ to concern itself, like the Commission, with the codification and progressive development of international law. Although it was a regional body, its activities had world-wide repercussions. It had a number of multilateral conventions and draft multilateral conventions to its credit and had influenced the Commission to some extent, particularly in regard to the codification of diplomatic law. For that reason the links between the Committee and the Commission should be consolidated as much as possible.

43. Sir Humphrey WALDOCK said that he wished to thank the observer from the Inter-American Juridical Committee for his very interesting observations. He would particularly like to ask him to explain to the Commission the methods of work followed by the Committee in producing its texts. Did it, for example, follow the procedure used in the Commission of assigning special rapporteurs to particular topics?

44. Mr. MOLINA ORANTES (Observer for the Inter-American Juridical Committee) said he must first thank members of the Commission for their cordial expressions of welcome and for the encouraging interest they had shown in his oral report and in the fruitful co-operation between the Commission and the Inter-American Juridical Committee.

45. In reply to the question put to him by Sir Humphrey Waldock, he would explain that it was the practice of the Committee to appoint a Rapporteur from among its members to prepare the work on each topic. The Rapporteur's report was then submitted to a working group, which in its turn reported to the plenary session of the Committee. The Secretariat of the OAS, in particular its Department of Legal Affairs and Codification Department, made a valuable contribution to such work by producing compilations of relevant material, which included not only regional instruments but also world-wide international instruments. The Committee was empowered to appoint outside experts to study particular subjects but only rarely had it availed itself of that faculty. The method was useful for highly technical topics and it was probable that it would be adopted for the study of intellectual property.

46. Mr. AGO, speaking also on behalf of Mr. Reuter, thanked Mr. Molina Orantes for the excellent report he had submitted to the Commission and asked him to convey to the Inter-American Juridical Committee his warm thanks for the work it had done on the law of treaties. It was most gratifying to learn that the Inter-American Juridical Committee was now moving away from a regional towards a universal approach, as it was imperative that the essential chapters of international law should be the subject of universal conventions. It was also significant that the largest group of signatories of the Vienna Convention on the law of treaties was the Latin-American countries; he hoped that their signatures would quickly be followed by ratifications.

47. The work done by the Inter-American Juridical Committee on the question of State responsibility had always been most instructive and he was sure it would continue to be so in the future. Mr. Molina Orantes could be assured that Latin-American jurists might count on the support and friendship of Latin-European jurists.

48. Mr. BARTOŠ said that he wished to express to Mr. Molina Orantes his admiration for the work of the Inter-American Juridical Committee, which, for almost fifteen years, had been taking a steadily more international approach, thereby contributing to the development of universal public international law. It was thanks to the influence of the Latin-American jurists that international law had developed considerably in such fields as immunity and diplomatic relations between States. Eminent Latin-American jurists were now taking part in every serious study in the field of international law, both public and private.

49. At the same time, the Inter-American Juridical Committee had not neglected regional, inter-American problems, some of which, under its influence, were acquiring world importance. Such matters as travellers' cheques, maritime law and the limits of territorial waters were examples of such problems. The whole international community was benefiting from the results of those regional studies.

50. He expressed the hope that the Commission would maintain increasingly close relations with the Inter-American Juridical Committee.

51. The CHAIRMAN said he had been interested to hear the explanations given by the Observer for the Inter-American Juridical Committee on all the various topics, especially those relating to private international law.

52. He regretted that it would not be possible for him to attend the Committee's next session in July and August 1972, but the Committee would be holding a second session in February 1973, at Rio de Janeiro and he was almost certain to be able to attend that one.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

[Item 1 (*a*) of the agenda]

(resumed from the previous meeting)

ARTICLE 18 (Former protected States, trusteeships and other dependencies) *(continued)*

53. The CHAIRMAN invited the Commission to resume its consideration of article 18 of the Special Rapporteur's fifth report (A/CN.4/256).

54. Mr. TABIBI said that article 18 covered certain transitional situations and a number of cases from the past. Even if the Commission decided not to retain article 18 as such but to alter the wording of other articles in order to cover those matters, the Special Rapporteur's commentary would always be very valuable, not only to members of the Commission but to jurists throughout the world.

55. He was not himself in favour of retaining article 18, because it would not cover all the cases and because its provisions conflicted with the well-established principles of international law of the "clean slate" and the right of self-determination.

56. The question of associated States, which had caused concern to the Special Rapporteur and to certain other members of the Commission, could be covered by adjusting the language of other articles of the draft, such as the article on unions of States.

57. Mr. REUTER said that as regards the subject matter of article 18 he agreed with Mr. Ago that the Commission should either be specific and comprehensive, or else say nothing.[8] He himself favoured the second alternative, in view of the experience of the Vienna Convention on the Law of Treaties and the rules which the Convention contained.

58. Article 6 of the Convention stated that "Every State possesses capacity to conclude treaties". The purpose of that formula was to prevent the occurrence of certain situations such as that of former protectorates. It meant that it was now impossible for a State to accept a protectorate régime, but not that a State was prohibited in any circumstances from renouncing its capacity to conclude treaties. Indeed, had article 6 gone as far as that, it would have settled one of the most difficult cases of succession of States, that of merger and absorption. Article 6 was designed to prohibit only certain treaties, those which were contrary to the principles of the Charter; it had been impossible to go further because it had been impossible to define the precise criteria by which it might be decided that a treaty established a protectorate and was therefore prohibited. He doubted whether the Commission could now do any better than the Vienna Convention.

59. Any system, however lawful, was open to abuse. For example, the quite important question of clandestine protectorates had been mentioned. Some alleged that there were a great many of them, others claimed that they were to be found even in federal unions where minorities were deprived of their right of self-determination, while still others suspected the super-powers of establishing them. He did not wish to be associated in any way with such views, which only undermined principles of co-operation and friendly relations between States.

60. But, even if the Commission managed to draw up rules for detecting situations contravening article 6 of the Vienna Convention, he doubted whether it would be possible to get them accepted by an intergovernmental conference. That seemed fairly clear from the fate of paragraph 2 of the Commission's draft article 5, on the capacity of States members of a federal union to conclude treaties,[9] on which the Commission itself had agreed only with difficulty [10] and which the Vienna Conference had rejected.

61. He would like to make one point on the question of Monaco. He had no doubt that all members of the Commission were agreed that Monaco was not a clandestine protectorate. Certainly the message of thanks which the Commission had addressed to Prince Rainier at the conclusion of its session at Monaco in 1966 contained no suggestion of any criticism of the structure or administration of the Principality.

62. With regard to the true protectorates, such as Morocco, it must be remembered that, under articles 51 and 52 of the Vienna Convention, a treaty was void if its conclusion had been procured by coercion. Consequently, not only had many protectorate treaties now become void, but a large proportion of the treaties concluded under the protectorate régimes had also become void. Moreover, it was not just a simple validity since, under article 45 of the Vienna Convention, even confirmation of such treaties was impossible. In cases such as that of Morocco, where the protecting Power had deposed the head of the Protectorate because it was displeased with his conduct, he was willing to agree that there was a general presumption of invalidity with respect to treaties concluded under the protectorate régime, but that could be harmful to the interests of former protected States and a more moderate approach was desirable.

63. For that reason he fully endorsed article 18 as proposed by the Special Rapporteur. The article might be unnecessary, since the question was settled by the Vienna Convention, but it was perfectly correct in the sense that it was for the protected State itself to decide whether or not it had been coerced. There were two situations: either the protected State having become independent considered that the treaty had not been concluded against its will—an example was the Pilgrimages to Mecca treaty [11] which had been negotiated by France in the name of Morocco and certainly at the instigation of the Sultan—in which case there was no succession; or the protected State considered that it had been coerced, in which case the treaties were void and it was impossible to speak of succession.

64. If the former protectorate wished to conclude a new treaty with the same content, it was free to do so, but it was entirely contrary to the Vienna Convention on the Law of Treaties to let it be supposed, by adopting new articles, that there could be any question of succession where States had been subjected to coercion. If the Commission nevertheless wished to deal with all those questions, it was only right that he should draw attention to the fate of one of its earlier drafts.

65. Mr. QUENTIN-BAXTER said that the general opinion on article 18 appeared to be that paragraph 2 could not stand as an exception to the rule in paragraph 1.

66. Paragraph 1 dealt with a number of categories of dependent territories among which it mentioned protected States, but even in the old days it was usual to draw a careful distinction between protectorates and dependencies. For example, the Kingdom of Tonga, now restored to full sovereignty during the century of its quite happy British protection, had never willingly allowed

[8] See 1174th meeting, para. 55.

[9] See *Official Records of the United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 11.

[10] See *Yearbook of the International Law Commission 1965*, vol. I, p. 280.

[11] See International Sanitary Convention 1926, in *Nouveau Recueil général des traités*, Series 3, vol. XXVI, pp. 162-233.

itself to be assimilated to a dependent territory. On all appropriate occasions it had gone to some lengths to emphasize the difference between its status and that of a dependency.

67. The State practice on which the provisions of paragraph 2 were based provided strong evidence of the appreciation by the international community, and in particular by its judicial organs, of the fact that a protected State retained some kind of international personality. Nevertheless, the old-fashioned term "protected State" unfortunately placed too much emphasis on form and too little on the substance.

68. During the discussion, certain small States of Europe had been cited as possible examples of dependent territories. In his opinion, those cases need not give rise to much concern, for under traditional international law, very small States which were recognized members of the international community—if for example, they were parties to the Statute of the International Court of Justice—could not be confused with dependent territories.

69. There was more room for concern with regard to associated States or territories, which were of two kinds. The first included areas which had exercised real autonomy for so long that their status as self-governing entities had never been questioned. The second was that of territories which had not been self-governing but which, in the full light of international surveillance, had emerged to self-governing status and had freely chosen to do so in association with an existing State.

70. Viewed in that light, the provisions of paragraph 2 would be seen to be really concerned not so much with protection as with representation. The substance of sub-paragraph (*a*) was likely to be subsumed by the provisions of the article on federations.

71. The idea in sub-paragraph (*b*) was of considerable importance in the context of associations of States and he hoped that some place would be found for it in the article on unions or federations.

72. As far as the wording was concerned, he would urge the retention of the important formula "by its own will", which went to the heart of the matter. On the other hand, he did not favour the retention of the formula "in its own name", which placed the emphasis on form rather than on substance. It might prove difficult for an associated State to contract in its own name because of inhibitions on the part of the other contracting State. The other State might be willing to sign an agreement relating to the territory of the associated State, an agreement to which the associated State might succeed later on attaining independence, but it might at the same time not wish to contract with the associated State in the latter's own name because such a procedure would raise the whole question of the status of associated States under international law.

73. He hoped that the questions he had mentioned would be taken up by the Commission in connexion with article 19.

74. Mr. USHAKOV, referring to paragraph 2 (*b*), asked who decided whether the former protected State had become a party to a treaty "by its own will". If it was a State other than the successor State, that was incompatible with the successor State's sovereignty. If it was the successor State itself, that was tantamount to recognizing the successor State's freedom of choice and its right to give notification or otherwise, which was the situation provided for in the preceding articles.

75. The CHAIRMAN, speaking as a member of the Commission, said that there was unanimity as to the great value of the Special Rapporteur's commentary but there was anything but unanimity on the question of the text of article 18.

76. As he saw it, the subject dealt with in paragraph 2 was important. The application of the provisions of sub-paragraph (*b*) would depend on the determination whether the protected State had become a party to a treaty "by its own will". In order to decide that issue, it might be necessary to investigate such matters as whether the authorities of the protected State represented a puppet régime, or a government with authority of its own based on free elections. The practical problems involved in settling that issue led him to the conclusion that the net result to be expected from the provisions of paragraph 2 (*b*) was not worth the difficulties likely to be encountered in their application.

77. Paragraph 2 (*a*) raised the question whether it was worthwhile to embody in a draft article the effect of the decision by the International Court of Justice in the Rights of Nationals of the United States of America in Morocco case,[12] which seemed to him reasonable. That decision, however, also gave rise to difficult problems of proof as to a question of fact, namely, whether it was not the will of the protecting power rather than that of the protected State which was involved in maintaining the treaty in effect. That was not as complicated a problem as the previous one.

78. Nevertheless, he was inclined to share the views of those members who favoured dealing with those matters in other contexts.

The meeting rose at 1.5 p.m.

[12] *I.C.J. Reports 1952*, p. 176.

1176th MEETING

Friday, 9 June 1972, at 10.20 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. El-Erian, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.